

{ S E R V E D }
{ February 13, 1992 }
{ FEDERAL MARITIME COMMISSION }

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1707(I)

PRO-INDUSTRIES, INCORPORATED

v.

SEA-LAND SERVICES, INCORPORATED

Decision of Joseph T. Farrell, Settlement Officer¹
Petition For Reconsideration Denied.

On January 13, 1992, Pro-Industries, Incorporated ("P-I", or "Petitioner") filed its Petition For Reconsideration ("Petition") of the Settlement Officer's December 17, 1991, decision in Informal Docket No. 1707(I). The Petition was timely filed in accordance with Rule 304(h) (46 CFR 502.304(h)) of the Commission's Rules of Practice and Procedure.

In that decision, the Settlement Officer denied reparation sought in connection with a shipment of plastic cups and lids that Sea-Land Service, Incorporated ("Sea-Land") carried from Jacksonville to San Juan, under a bill of lading dated August 16,

¹ Pursuant to Rules 304(g) and (h) of the Commission's Rules of Practice and Procedure, this decision will become final unless the Commission elects to review it within 30 days of the date of service.

1991. Sea-Land originally rated the cargo as: "Plastic Articles, Viz.: . . . Caps . . . Cups/Glasses/Jars/Jugs", in accordance with Item 204734² of its Tariff No. 482, FMC-F No. 61 ("Tariff"). Upon its arrival in Puerto Rico, the cargo was inspected by The Adherence Group, Inc. ("TAG"), which determined that a misrating had occurred. TAG concluded that the Tariff's Item 201560³, "Dinnerware or Food Service Articles, Aluminum, Paper, Plastic, Polystyrene, or Wood, Disposable Designed For Single Service Use, Viz.: . . . Cups . . . Lids", should have been the basis for rating. The Settlement Officer's decision, noting that the shipper's invoice showed the cargo to be "foam cups" and "lids for foam cups", sustained TAG's action.

P-I argues now, as in its original complaint, that ambiguity exists between the two Tariff descriptions:

"Our original complaint was based on what we perceived to be the apparent ambiguity between Item 201560 and Item 204734 in FMC 482. In his decision, the settlement officer found none. The officer points out what he sees as the distinction, namely that Item 201560 includes specific reference to plastic polystyrene. This point is acknowledged, and further supported when one compares the same item in Sea-Land's intermodal tariff I.C.C. 534.⁴ Item 204734 is another matter. These Items are found in Item 204740.⁵ There is no mention of 'Hard' plastic, which the settlement officer bases his perception on.

² 7th Revision of Page 146-A, effective May 1, 1991.

³ 5th Revision of Page 64, effective January 23, 1991.

⁴ Sea-Land Service, Inc. Freight Tariff No. 534 ICC SEAU 534 ("ICC Tariff").

⁵ That is, in Sea-Land's ICC Tariff.

But there is a clear and specific reference to 'Single Service Disposable Plastic or Polystyrene'. Clearly, the line's intent was to allow for polystyrene and 'hard' plastic to move under the same item. Keep in mind both tariffs are filed by the same company. We contend that the perceived intent which the settlement officer used in making his decision is not clear, and when one goes to the line's intermodal tariff, the exact opposite is evident.

We reiterate our existing problem in trying to determine the exact difference between those plastic knives, forks, and spoons listed under Item 201560, FMC 482, and those plastic knives, forks, and spoons included in Item 204734, FMC 482. How does one make the determination? Must we continue to pay the higher rates published for Item 201560?

The Commission has recently taken action attempting to help eliminate some of the difference between itself and the I.C.C. in the regulation of domestic offshore trades. We submit this request for reconsideration in light of these recent changes. We don't ask the Commission to interpret the Items in the I.C.C. Tariff, but just to acknowledge the clear ambiguity which exists between the Tariff when one is shipping plastic articles, and take this into consideration."

The Commission's Rules of Practice and Procedure provide that a petition will be subject to summary rejection unless it fulfills at least one of three conditions⁶:

1. Specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;
2. Identifies a substantive error in material fact contained in the decision or order;

⁶ 46 CFR 502.304(h). "Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received."

3. Addresses a material matter in the Settlement Officer's decision upon which the petitioner has not previously had the opportunity to comment.

Petitioner raises three issues: first, an ambiguity does exist between the two commodity descriptions at issue; second, the existence of critical additional language in Sea-Land's ICC Tariff clarifies its "intent" with respect to the applicable FMC Tariff; third, events relevant to ICC/FMC jurisdictional matters somehow affect this question of tariff interpretation.

The argument with respect to ambiguity clearly constitutes an elaboration on or repetition of Petitioner's original contention. The Settlement Officer found that Item 201560 more clearly describes the commodity shipped, and no grounds exist to reopen that discussion. The second issue concerns language found in an ICC Tariff, and is of no relevance to this proceeding. In any case, Sea-Land's "intent" is not of material interest, for it is the plain words of the Tariff, rather than the carrier's intent, that must be the determining factor.⁷

The third argument, which apparently is related to the second, suggests that a clarification of interagency issues should somehow influence the Settlement Officer's decision. Petitioner does not explain the relevance of this suggestion, but, in any case, it does not address any of the acceptable grounds for reconsideration.

⁷ Johns Manville Products Corporation, 13 FMC 192, 194. Petitioner is incorrect in concluding that the Settlement Officer interpreted, or attempted to interpret, Sea-Land's intent. The original decision relied on the Tariff's actual words.

Since none of P-I's arguments can be accepted in terms of those grounds, the Petition must be summarily rejected.

As a final point, the Settlement Officer notes P-I's question concerning the proper rating of plastic knives, forks, and spoons. Inasmuch as this proceeding concerned only cups and lids, the answer is outside the scope of the complaint. However, as Petitioner observes, Sea-Land's ICC Tariff encompasses more favorable language. P-I might wish to discuss with Sea-Land the possibility of amending the language of Tariff FMC No. 61.



Joseph T. Farrell
Settlement Officer